Pre-MSC Discovery In Workers' Compensation Cases

(A) General Proposition: Pursuant to the California Constitution the WCAB has been established to adjudicate workers' compensation disputes. The mandate is to provide "substantial justice" in all cases "expeditiously, inexpensively, and without encumbrance of any character…." Under this system, a party's right to conduct discovery is subjected to a balancing test which weighs liberal discovery and due process (to include privileges), while allowing for full development of the record. The Workers' Compensation Administrative Law Judge (WCJ) has comprehensive authority to decide discovery disputes:

(1)Statutory Provisions: WCJ's powers-LC 5701,LC5309, LC5310, LC5708, Rule 10348.

(2)Case Law: Hardesty 41CCC111; Lubin 41CCC283; Allison 64CCC624; Martin 62CCC1500; Clark 26CWCR136; Fortier 28CWCR75; Hudson 21CWCR208; Trivitt 64CCC575; Jefferson 66CCC277; Moreno 21CWCR108; Thomas 59CCC789.

(3) CCP vs. Administrative Director's Rule: Moran 57CCC273; Schooley 26CWCR234.

(B) Discovery Tool: Depositions are authorized under LC5710. There are no provisions in the Labor Code made for interrogatories and no provisions requiring a party or witness to volunteer a statement. Therefore, absent an agreement, a deposition is the only authorized means of eliciting the testimony of a witness prior to trial. However, the manner in which a deposition is taken and the scope of what can be discovered at a deposition is limited:

(1) Case Law: Mackentire 27CWCR189; Stewart 87Cal. App. 4th1006; McCabe 29CWCR223; Allison 64CCC624; San Diego Trolley 66CCC352.

(2) Cross-examination of medical witnesses by deposition is favored: Rule 10727; De Carlo 46CC848; Lua 50CCC374.

(A) Discovery Tool: Defendants frequently secure investigative films (sub rosa). The WCJ can see for him or her self what is depicted in the films. As such, this evidence is subject to greater reliance and less interpretation. Films are most useful in physical injury cases in which the applicant is claiming significant disability and the need for work restriction. However, in some instances the films are not persuasive. Even when an injured worker is filmed exceeding a recommended restriction, it may be argued that this was not medically advisable or that based on objective medical evidence the restriction should have been followed. It may be claimed that the applicant suffered the physical consequences of exceeding the restriction later when he or she was not being filmed. Investigative films are most often discoverable before the MSC. Case law dictates when this will occur:

(1) Case Law: Downing 16CWCR76; Kyles 27CWCR194; Nisle 28CWCR299.

(A) Discovery Tool: Claims administrators are obligated pursuant to Rule 10109 to "conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for workers' compensation benefits." The purpose is to determine what benefits are due to the employee. An employer level investigation may be part of the process. The employer, supervisors, co-employees, and other witnesses may be statementized. An investigator may be hired to conduct an investigation. Frequently, applicants request that the defendants provide them with copies of the statements and investigation reports. Not infrequently defendants object on the basis of work product and attorney-client privileges. The WCJ has to determine whether to order the defendant to turn over the requested materials. The balancing test weighing the goal of liberal discovery against due process rights and privileges is considered:

(1) Privileges: Attorney-Client, EC 952; Work Product, CCP 2018.

(2) Case Law: Moreno 21CWCR108; Martin 62CCC1500; Chadbourne 60Cal.2d723; Hardesty 41CCC111;Thomas 59CCC789; Wilson 226CalApp2d715.

(3) Inspection of Premises: CCP 2031; LC 5708; Abron 38CCC591.

(4) Autopsy: LC 5706

(A) Discovery Tool: Medical legal exams and medical treatment exams are the most commonly used discovery tool. Pursuant to LC 4061 and LC 4062, a treating doctor, agreed medical examiner (AME), or qualified medical examiner (QME) must have performed a medical evaluation of the applicant before a declaration of readiness on any medical issue may be filed. To be useful for litigation purposes and admissible into evidence the doctor's report must constitute substantial evidence as defined by case law and Rule 10606. The applicant's medical history and a history of the industrial injury must be included in the medical report and must be generally correct as to relevant and important facts. The WCJ must determine in every case whether a medical report(s) constitutes substantial evidence. Medical reports must be filed timely (Rule 10622). As to QME exams, in particular, there are additional issues to consider. Before securing a QME exam, a party has to "do the dance" and do it timely. A party is limited to one QME exam except that party may chose to pay for another. There are circumstances as specified by case law, when more than one QME may be used. Follow up exams with the same QME are required when possible:

(1) Substantial Evidence: Guerra 50CCC270.

(2) Timely Objections: Finch 64CCC907; Strawn 28CWCR105.

(3) The Dance: Carranza 61CCC1226; Eble 24CWCR23

(4) More Than One QME: Gubbin 62 CCC946; Aguiling 27CWCR137.

(5) Follow Up Exams: Alie 28CWCR17; LC 4061(g); LC 4062(c); LC 4067.

(A) Discovery Tool: Pursuant to LC 130 and Rule 10530, the WCAB has the power to issue subpoenas duces tecum (SDT) for the production of records. A copy of the SDT must be sent to all parties (LC 4055.2) and relevant medical records offered into evidence must be designated (Rule 10626). Securing medical and personnel records is an important part of a comprehensive aoe-coe and apportionment investigation. However, a party's right to secure and review records is not unlimited. If there is a dispute, the WCJ is empowered to resolve it. An in camera inspection of the records may be required:

(1) Case Law: Allison 64CCC624; City of Santa Ana 65CCC289; Saldivar 60CCC646; Serrano 48CCC191; Beals 24CWCR110; Fortier 28CWCR75.

(2) Personnel Records: Bailey 63CCC750; Trivitt 64CCC575

(3) Employer's First Report: LC 6412.

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POST MSC DISCOVERY IN WORKERS' COMPENSATION CASES

I Background – Pre-1990 "Reforms"

A. Closure of Discovery

No requirement that discovery close at pre-trial conference.

1. Not uncommon for discovery to continue after pre-trial up to date of trial.

B. Use of Independent Medical Examiners (Labor Code §139; §5701; §5703.5; Board Rule 10700)

Prior to the imposition of the QME process on January 1, 1991, the Appeals Board had authority to order additional evaluation of an applicant.

1. Labor Code §5701 states that the Appeals Board "may. . . direct any employee claiming compensation to be examined by a regular physician", and that the results of any such examination be reported to the Appeals Board for it's consideration.

2. Pursuant to Labor Code §5703.5 the Appeals Board had authority to order an injured worker to be examined by an independent medical examiner (IME) selected by the Appeals Board, upon agreement of a party to pay the cost.

3. Pursuant to Board Rule 10700, the Appeals Board could request referral to an independent medical examiner by agreement of a party to pay the cost, or "with payment for such examination to be made by the Division of Workers' Compensation".

4. The Appeals Board could also, upon agreement of a party, refer a disputed medical issue to an agreed medical examiner (AME) selected by the parties, or by the Appeals Board with the consent OF the parties.

It was not uncommon for Workers' Compensation Judges to encourage the parties to agree to an AME or referral to an IME, especially in those cases where the range of medical opinion was significant or where the evidence needed further development.

This is consistent with the longstanding principle that if the WCJ determines the evidence is insufficient, unclear or conflicting, the record should be developed to secure a fair and just decision. The WCAB "may not leave undeveloped matters which its acquired,

specialized knowledge should identify as requiring further evidence." *Minnie West v. IAC (Best)* 12 Cal. Comp. Cases 86, 89 (1947) (see also *Raymond Plastering Company v. WCAB (King)* 32 Cal. Comp. Cases 387 (1967))

II Post "Reforms"

A. Closure of Discovery

All cases for which a Declaration of Readiness to Proceed is filed shall be set for Mandatory Settlement (MSC) (Labor Code §5502)

Labor Code §5502(d)(3) mandates closure of discovery at the Mandatory Settlement Conference (MSC):

> "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

B. Use of Independent Medical Examiners

1. Labor Code §5703.5 as amended in 1989 and 1990 allowed the Appeals Board to direct the examination of an UNREPRESENTED injured worker by a QUALIFIED MEDICAL EXAMINER chosen by the Appeals Board, upon agreement of a party to pay the cost, for injuries occurring on or after January 1, 1991.

2. Labor Code §139.1, enacted in 1990 and new Board Rule 10700 also enacted in 1990 limited referral to an IME or AME to dates of injury occurring before January 1, 1991. Moreover, Labor Code §139.1 requires the consent of the injured worker or his/her attorney or representative before such a referral can take place.

3. However, Labor Code §4061(c) and (d) and Labor Code §4062(b) permitted a party to obtain another evaluation from another physician "where the Appeals Board determines there is good cause" for such additional evaluation, for injuries between January 1, 1991 and December 31, 1993. These provisions applied to represented workers and is difficult to reconcile with Labor Code §139.1, which limited referral of represented workers to an IME or AME to those injuries occurring <u>before</u> 1991 <u>and</u> requires the injured worker to agree to such evaluation.

III Closure of Discovery – The Cases

A. Most cases centered on (1) whether the evidence was available or (2) whether or not it would have been discovered by the exercise of due diligence prior to the MSC:

Transamerica Insurance Group v. WCAB (Jessey), 60 Cal.Comp.Cases 246 (Writ Denied 1995):
Medical reports were not admitted as rebuttal evidence at hearing where the reports were not listed at MSC and defendants knew of their existence and knew or should have known that their contents were relevant at the time of MSC.

McCaren v. Kentfield Rehabilitation Hospital, 21 Cal. Workers' Comp. Rptr.112 (Board Panel Decision 1992)
Report of treating physician showing improvement of applicant's condition was admissible when, unknown to defendant, treater had examined applicant after earlier medical reports offered by applicant at the MSC.

Mills v. Republic Indemnity Company, 22 Cal. Workers' Comp.Rptr. 139 (Board Panel Decision 1994)
Where the name of the investigator was listed as a prospective witness on the MSC statement, the Board panel held that a sub rosa film taken following the MSC and a medical report relating to those films should have been admitted into evidence because the films were not available before the MSC.

City of Redondo Beach v. WCAB (Levick), 62 Cal.Comp.Cases 341 (Writ Denied 1997)
No error in admitting medical report into evidence which was obtained after the MSC. The earliest date for an appointment with the reporting physician was after the MSC so the report was unavailable at the time of the MSC but the appointment was disclosed prior to the MSC, the report was listed as an exhibit at MSC and defendant obtained rebuttal reports.

County of Sacramento v. WCAB (Estrada), 64 Cal.Comp.Cases 26 (1999)
WCJ erred in allowing record to remain open after MSC for supplemental report to cure defective QME report where defendant previously objected to the defective report and applicant made no effort to obtain the supplemental report prior to MSC.

Larry Guinard v. WCAB, 61 Cal.Comp.Cases 706 (1996)
Sub rosa video taken after MSC admitted to rebut medical reports disclosed at MSC but not filed or served until day of trial.

Betty Martin v. WCAB, 63 Cal.Comp.Cases 1180
2-1 Board panel was upheld in rescinding WCJ's order disallowing sub rosa of applicant taken after MSC. Assumed "arguendo" that applicant did not engage in the observed activities until after the MSC and therefore the evidence was not available, and would not have been discovered through the exercise of due diligence prior to the MSC.

IV "Duty to Develop the Record"

A. With mandatory closure of discovery at MSC and seemingly restricted ability to order additional evaluation there appeared to be less opportunity to develop the record as a result of the reform legislation, at least until:

Bernard Tyler v. WCAB, 62 Cal.Comp.Cases 924 (1997)
Labor Code §5701 gives the WCJ authority to seek further medical evaluation in aid of making a determination when there is insufficient medical evidence in the record on which to base a decision. Labor Code §5906 gives the WCAB the same authority on reconsideration. The WCJ in this case had authority to seek additional medical evaluation, when there is no substantial medical evidence in the record to support his conclusion that applicant's psychiatric condition was caused by stress on the job. See also *Steve McClune v. WCAB*, 63 Cal.Comp.Cases 261 (1998)

Note: In both *Tyler* and *McClune* the WCJ's noted that the 1989 reform legislation eliminated the ability to refer represented employees to an IME for dates of injury after January 1, 1991. In both cases the Courts of Appeal cited Labor Code §§5701 and 5906 in concluding that the WCJ and WCAB have the authority to order the taking of additional evidence when the record lacks substantial evidence to support a finding of industrial causation.

In *San Bernardino Community Hospital v. WCAB (McKernan*) 64 Cal. Comp.Cases 986 (1999) the Court of Appeal, Fourth Appellate District held that the WCJ and WCAB abused their discretion by allowing applicant's witness to testify at trial and by admitting the last report of applicant's evaluating physician when neither were disclosed at the time of the MSC, and applicant did not sufficiently explain why the evidence was not available or why she could not have discovered the evidence with due diligence by the time of the MSC.

Note: The Court in *McKernan* distinguished *Tyler* and *McClune*, pointing out that in neither case was there any consideration of Labor Code §5502(d)(3) mandate that discovery close at MSC. Regarding the power to develop the record the court stated:

> ". . . in our view the clear and explicit language of section 5502, subdivision (d)(3) should prevail over the more amorphous powers given by sections 5701 and 5906 where the former statute applies." (at page 64)

The Court in *McKernan* criticized the WCAB and the court in *Tyler*, stating that *Tyler* appeared to be an example of the WCAB's use of power to develop the record to bail out an applicant whose previous attorney did not adequately prepare the case.

Food for thought: Study *McKernan* and *Estrada* and compare to *Tyler* and *McClune* (all cited above). The California Workers' Compensation Reporter has observed that the WCAB is in the unenviable position of being required to resolve the conflict between (1) the duty to develop the record and to augment unsatisfactory records and (2) the duty to close discovery and to refuse augmentation of the record where the parties are not prepared to offer competent evidence when the case is heard.

Other cases in discovery closure and/or duty to develop the record:

S.T.A.T. Nursing Services v. WCAB (Fickinger) 64 Cal.Comp. Cases 189 (1999)
Nancy Richards v. WCAB, 63 Cal.Comp.Cases 337 (1998)
M/A Com-Phi v.WCAB (Sevadjian), 63 Cal. Comp.Cases 821 (1998)
Boomsliter v. Continental Insurance Company, 27 Cal.Workers' Comp.Rptr. 192 (Board Panel Decision 1999)
Kyles v. Rosan Fairchild, 27 Cal.Workers'Comp.Rptr. 194 (Board Panel Decision 1999)
Martinez v. State Compensation Insurance Fund, 29 Cal.Workers'Comp.Rptr. 80 (Board Panel Decision 2001)

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